

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of:)	
)	
KM Television of Flagstaff, L.L.C.)	
)	
v.)	CSR-5760-M
)	
EchoStar Communications Corporation)	
)	
Request for Mandatory Carriage of)	
Television Station KCFG (TV))	
Flagstaff, Arizona)	

MEMORANDUM OPINION AND ORDER

Adopted: January 25, 2002

Released: January 31, 2002

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. KM Television of Flagstaff, L.L.C. (“KM”), licensee of commercial television station KCFG (TV), Channel 9, Flagstaff, Arizona (“KCFG” or the “station”) filed the above-captioned must carry complaint against EchoStar Communications Corporation (“EchoStar”), pursuant to Section 338 of the Communications Act of 1934, as amended (the “Act”), and Section 76.66 of the Commission’s rules¹ for its refusal to carry the signal of KCFG on its satellite system.² KCFG states that Echostar is providing “local-into-local” satellite service in the Phoenix, Arizona market, which is the designated market area (“DMA”) where station KCFG operates, pursuant to the statutory copyright license.³ In its complaint, the station alleges that EchoStar has failed to meet its must carry obligations under the Commission’s satellite broadcast signal carriage rules. KCFG requests that the Commission order EchoStar to carry the station’s signal on EchoStar’s satellite system. EchoStar filed an opposition to the complaint and KCFG filed a reply.⁴ EchoStar filed a “Motion For Leave to File Supplemental Response” and the corresponding

¹ 47 C.F.R. § 76.66. We note that on December 7, 2001, the U.S. Court of Appeals for the Fourth Circuit unanimously upheld the constitutionality of Section 338 of the Act, and Section 76.66 of the Commission’s rules. *See SBCA v. FCC*, Nos. 01-1151, 01-1271, 01-1272 and 01-1818, 2001 WL 1557809 (4th Cir. Dec. 7, 2001).

² Cable Special Relief and Show Cause Petitions, Report No. 0016 (October 15, 2001).

³ *See* 17 U.S.C. § 122(a); 47 U.S.C. § 339. A satellite carrier provides “local-into-local” satellite service when it retransmits a local television signal back into the local market of that television station for reception by subscribers. 47 C.F.R. § 76.66(a)(6).

⁴ Under Section 76.66(m)(3) of the Commission’s rules, a local television broadcast station that disputes a response by a satellite carrier that it is in compliance with its must carry obligations may obtain review of such denial or response by filing a “complaint” with the Commission in accordance with Section 76.7. 47 C.F.R. § 76.66(m)(3). Although styled a “complaint,” a carriage complaint filed against a satellite carrier is treated by the Commission as a petition for special relief for purposes of the Commission’s pleading requirements. *See 1998* (continued....)

supplemental response. KCFG filed an opposition to the motion and supplemental response.⁵ For the reasons set forth below, we grant the complaint.

II. BACKGROUND

2. Section 338 of the Act, adopted as part of the Satellite Home Viewer Improvement Act of 1999 (“SHVIA”),⁶ requires satellite carriers, by January 1, 2002, to carry on request all local television broadcast stations’ signals in local markets in which the satellite carrier carries at least one local television broadcast signal pursuant to the statutory copyright license.⁷ For the initial election cycle, broadcast stations were required to notify satellite carriers by July 1, 2001, of their mandatory carriage election for carriage to commence by January 1, 2002.⁸ A station’s market for satellite carriage purposes is its DMA, as defined by Nielsen Media Research.⁹ In November 2000, the Commission adopted rules to implement the provisions contained in Section 338.¹⁰

3. Under the Commission’s broadcast signal carriage rules, each satellite carrier providing local-into-local service pursuant to the statutory copyright license is generally obligated to carry any qualified local television station in the particular DMA that made a timely election for mandatory carriage, unless the station’s programming is duplicative of the programming of another station carried by the carrier in the DMA.¹¹ One television station’s programming is generally considered duplicative of

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Biennial Regulatory Review: Part 76 – Cable Television Service Pleading and Complaint Rules, 14 FCC Rcd 418 (1999). Responsive pleadings filed in this context, therefore, must comply with the requirements set forth in Section 76.7(b)(1).

⁵ This matter may be resolved by the substantive arguments raised in the initial pleading cycle. Accordingly, EchoStar’s motion to accept its supplemental response is denied, and KCFG’s opposition to the supplemental response is rendered moot.

⁶ See Pub. L. No. 106-113, 113 Stat. 1501, 1501A-526 to 1501A-545 (Nov. 29, 1999).

⁷ See 47 U.S.C. § 338.

⁸ See 47 C.F.R. § 76.66(c)(3); see also 76.66(c)(4) (“Except as provided for in paragraphs 76.66(d)(2) and (3), local commercial television broadcast stations shall make their retransmission consent-mandatory carriage election by October 1st of the year preceding the new cycle for all election cycles after the first election cycle.”).

⁹ A DMA is a geographic area that describes each television market exclusive of others, based on measured viewing patterns. See 17 U.S.C. § 122(j)(2)(A)-(C); see also *Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues; Retransmission Consent Issues*, 16 FCC Rcd 1918, 1934 (2000) (“*DBS Must Carry Report & Order*”); 47 C.F.R. § 76.66(e) (“A local market in the case of both commercial and noncommercial television stations is the designated market area in which a station is located, and (i) in the case of a commercial television broadcast station, all commercial television broadcast stations licensed to a community within the same designated market area within the same local market; and (ii) in the case of a noncommercial educational television broadcast station, the market includes any station that is licensed to a community within the same designated market area as the noncommercial educational television broadcast station.”).

¹⁰ See generally *DBS Must Carry Report & Order*, 16 FCC Rcd at 1918 *et seq.* The Commission later affirmed and clarified its carriage rules. See *Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues*, 16 FCC Rcd 16544 (2001) (“*DBS Must Carry Reconsideration Order*”).

¹¹ See 47 C.F.R. § 76.66. Commercial television stations are required to choose between retransmission consent and mandatory carriage by July 1, 2001; NCE stations, on the other hand, must simply request carriage. The first retransmission consent-mandatory carriage election cycle is for a four-year period commencing on January 1, 2002 and ending December 31, 2005. 47 C.F.R. § 76.66(c)(1). To facilitate the carriage process, satellite carriers are required to respond to a television station’s carriage request within 30 days, and state whether they accept or deny the carriage request. Those stations licensed to provide over-the-air service for the first time on or after July 1, 2001 are considered new television broadcast stations for satellite carriage purposes. See *DBS Must Carry Report*

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another station's if both stations simultaneously broadcast identical programming for more than 50% of the broadcast week.¹² If the stations' programming is duplicative, the satellite carrier may choose which duplicating signal it will carry.¹³ Furthermore, under the SHVIA, a television station asserting its right to carriage is required to bear the costs associated with delivering a good quality signal to the designated local receive facility of the satellite carrier or to another facility that is acceptable to at least one-half the stations asserting the right to carriage in the local market.¹⁴ To be considered a good quality signal for satellite carriage purposes, a television station must deliver to the local receive facility of a satellite carrier either a signal level of -45dBm for UHF signals or -49dBm for VHF signals at the input terminals of the signal processing equipment.¹⁵

4. Whenever a local television broadcast station believes that a satellite carrier has failed to meet its obligations under Section 338 of the Act or our implementing regulations, such station shall first notify the carrier, in writing, of the alleged failure and identify its reasons for believing that the satellite carrier has failed to comply with its obligations.¹⁶ Within 30 days after such written notification, the satellite carrier must respond in writing and comply with its obligations or state its reasons for believing that it is already doing so.¹⁷ The Commission does not require satellite carriers to conduct tests or present specific measurements to broadcasters in response to requests for mandatory carriage. At the same time, however, the satellite carrier is required to have a reasonable, good-faith basis for denying carriage and is obliged to convey that information to the broadcast station affected. As the Commission stated: "It is not consistent with the SHVIA or our rules to attempt to place the burden on the broadcast station to prove why it is entitled to carriage in the absence of a legitimate reason for questioning its eligibility."¹⁸ Specifically with respect to disputes over signal quality, a station should not be rejected for carriage unless, based on a knowledge of the facts and circumstances involved, there are engineering reasons for doubting that a good quality signal is likely to be available.¹⁹ Should a station fail to provide the required over-the-air signal quality to a satellite carrier's receive facility, it still may obtain carriage rights if "the

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and Order, 16 FCC Rcd at 1933. A new television station is required to make its initial election between 60 days before commencing broadcast and 30 days after commencing broadcast. Assuming the station meets all of the requirements under Section 338 and the Commission's rules, the satellite carrier shall commence carriage within 90 days of receiving a carriage request from the television broadcast station or whenever the new television station provides over-the-air service. *See id.*; 47 C.F.R. § 76.66(d)(3).

¹² *See* 47 C.F.R. § 76.66(h)(1) ("A satellite carrier shall not be required to carry upon request the signal of any local television broadcast station that substantially duplicates the signal of another local television broadcast station which is secondarily transmitted by the satellite carrier within the same local market, or the signals of more than one local commercial television broadcast station in a single local market that is affiliated with a particular television network unless such stations are licensed to communities in different States.")

¹³ *See* 47 U.S.C. § 338(b)(1). *See also* 47 C.F.R. § 76.66(h); *DBS Must Carry Report & Order*, 16 FCC Rcd at 1949-51.

¹⁴ 47 C.F.R. § 76.66(g)(1). *See DBS Must Carry Report & Order*, 16 FCC Rcd at 1938-45. *See also DBS Must Carry Reconsideration Order*, 16 FCC Rcd 16568-70 (affirming previous holding that selection of an alternative receive facility is based on the vote of the majority of the stations entitled to carriage in each affected market, not just the stations actually electing mandatory carriage).

¹⁵ 47 C.F.R. § 76.66(g)(2). *See DBS Must Carry Reconsideration Order*, 16 FCC Rcd at 16559-61.

¹⁶ *See* 47 U.S.C. § 338(f)(1); *see also* 47 C.F.R. § 76.66(m)(1).

¹⁷ *See* 47 C.F.R. § 76.66(m)(2).

¹⁸ *DBS Must Carry Reconsideration Order*, 16 FCC Rcd at 16574.

¹⁹ *Id.* at 16572.

station responds with a promise to provide or pay to provide a good quality signal in the future.”²⁰

5. If Commission action is needed, as KCFG alleges here, a broadcast station may file a complaint with the Commission within 60 days after the satellite carrier submits a final rejection of the station’s carriage request.²¹ If a satellite carrier provides no response to a must carry election, the 60 day period commences after the time for responding as required by the rule has elapsed.²² Below, we consider the complaint filed by Station KCFG.

III. DISCUSSION

6. In support of its complaint, Station KCFG states that EchoStar has improperly denied KCFG’s election request on the grounds that the station does not provide a good quality signal to EchoStar’s local receive facility (“LRF”).²³ KCFG states that it has agreed to provide, at the station’s expense, a good quality signal to the LRF by alternative means to over-the-air transmission if necessary.²⁴

7. In its opposition, EchoStar argues that its denial of KCFG’s election request was based on the satellite carrier’s testing of the station’s signal, which demonstrated no signal whatsoever at Echostar’s Gilbert, Arizona LRF.²⁵ Echostar states that the station is located 130 miles from its LRF with significant intervening terrain obstructions, and that there is no possibility of the station actually delivering any signal to the receive facility. EchoStar argues that even though Congress adopted no mechanism for satellite carriers to modify their markets, the instant matter “calls out for some similar relief.”²⁶

8. In reply, KCFG agrees that its signal strength is currently not sufficient to deliver a good quality over-the-air signal to Echostar’s LRF. KCFG states that it has an application pending at the Commission to relocate its transmit site and increase the station’s effective radiated power. KCFG anticipates that a microwave link will be the most cost-effective method of delivering a good signal to EchoStar’s LRF, and that such delivery will be simpler to establish from the new facility. KCFG states that it is currently evaluating the feasibility and timeframe of establishing a microwave link from its current transmit facility. KCFG also contends that if EchoStar believes that the Commission erred in implementing SHVIA and the definition of local markets for satellite carriers, the instant adjudicatory proceeding is not the proper venue for raising such concerns.

9. The question presented in this proceeding is whether and under what conditions KCFG is entitled to have its signal carried within the Phoenix, Arizona market over the facilities of EchoStar. Based on the information provided, we believe that EchoStar has a reasonable basis for believing that KCFG does not deliver a good quality signal to EchoStar’s LRF. However, the Commission has noted

²⁰ *Id.* at 16573.

²¹ See 47 C.F.R. § 76.66(m)(6); *DBS Must Carry Reconsideration Order*, 16 FCC Rcd at 16574. A television station seeking a finding on the facts and a resulting determination of whether it is entitled to carriage pursuant to Section 76.66 of our rules may file a complaint with the Commission. If, however, a television station that is not being carried seeks damages or other form of monetary or injunctive relief under Section 338(a) of the Act or Section 501(f) of the Copyright Act, then the United States District Court is the exclusive forum for adjudicating the merits of its claim. *DBS Must Carry Report & Order*, 16 FCC Rcd at 1974.

²² See *DBS Must Carry Reconsideration Order*, 16 FCC Rcd at 16574.

²³ Complaint at 3.

²⁴ *Id.*

²⁵ Opposition at 2.

²⁶ *Id.* at 5.

that the station also “has the opportunity to improve its over-the-air signal or arrange alternative means of delivery.”²⁷ While KCFG has not demonstrated that it currently delivers a good quality signal, the station has committed to delivery of a good quality signal, at KCFG’s expense, by alternate means. In light of this commitment, and in the absence of any other objection by EchoStar, we conclude that KCFG is entitled to carriage. In regard to EchoStar’s argument regarding market modification for satellite carriers, the Commission has specifically rejected implementation of such a market modification as “counter to the express intent of Congress.”²⁸

10. In the *DBS Must Carry Reconsideration Order* we found that, in the context of DBS carriers’ commencement of mandatory carriage, 75 days is a reasonable time frame within which a satellite carrier could arrange for carriage of a station following delivery of a good quality signal from a broadcaster.²⁹ Accordingly, we find that KCFG is entitled to mandatory carriage on EchoStar’s satellite system within 75 days of delivering a good quality signal to EchoStar’s local receive facility.

IV. ORDERING CLAUSES

11. Accordingly, **IT IS ORDERED**, pursuant to Section 338 of the Communications Act, as amended, 47 U.S.C. § 338, and Section 76.66 of the Commission’s rules, 47 C.F.R. § 76.66, that the must carry complaint filed by KM Television of Flagstaff, L.L.C., licensee of commercial television station KCFG(TV), Flagstaff, Arizona, against EchoStar Communications Corporation **IS GRANTED** to the extent indicated herein.

12. **IT IS FURTHER ORDERED** that Echostar shall commence carriage of Station KCFG’s signal within 75 days from the date on which KCFG provides a good quality signal to Echostar’s local receive facility.

13. This action is taken by the Deputy Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission’s rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

²⁷ *DBS Must Carry Reconsideration Order*, 16 FCC Rcd at 16573.

²⁸ *See DBS Must Carry Report & Order*, 16 FCC Rcd at 1937.

²⁹ *See DBS Must Carry Reconsideration Order*, 16 FCC Rcd at 16573, n. 198.